DEPARTMENT OF STATE REVENUE

04960016.LOF

LETTER OF FINDINGS NUMBER: 96-0016 ST
Sales/Use Tax — Collection of Use Tax
Tax Administration — Penalty
For Tax Periods: 1986 through 1994

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales/Use Tax — Collection of Use Tax

Authority: IC 6-2.5-8-8(a); IC 6-2.5-8-9(b); IC 6-2.5-3-2(a); IC 6-2.5-3-1(c); IC 6-8.1-5-1(b) 45 IAC 2.2-3-20; 45 IAC 2.2-3-19(a)

Taxpayer protests the assessment of Indiana use tax on its sales to Indiana purchasers.

II. Tax Administration — Penalty

Authority: IC 6-8-10-2.1; 45 IAC 15-11-2; 45 IAC 2.2-3-20

Taxpayer protests the imposition of a ten percent (10%) negligence penalty.

STATEMENT OF FACTS

Taxpayer, an Ohio based corporation, made, during the audit period, retail sales of office furniture and equipment. Some of these sales were made to customers located in the state of Indiana. Although taxpayer did not maintain an Indiana location, many of its Ohio based customers did have Indiana locations. It was to these Indiana locations that taxpayer made sales and deliveries. Taxpayer used its own delivery trucks, as well as common carrier, to ship its products to its Indiana customers. Taxpayer neither registered with the Indiana Department of Revenue nor collected Indiana use tax on its Indiana sales. Therefore, as the result of a subsequent Indiana sales and use tax audit, taxpayer was assessed use tax on those sales and shipments to its Indiana customers.

I. Sales/Use Tax — Collection of Use Tax

DISCUSSION

Taxpayer protests the proposed assessment of use tax on its sales and shipments to its Indiana customers for the years 1986 through 1994.

Audit's position is that taxpayer, as an out-of-state retail merchant making deliveries into Indiana with its own trucks, should have registered with the Indiana Department of Revenue and collected use tax on the merchandise sold and delivered into Indiana. According to Audit, taxpayer should have registered in 1986. Since taxpayer did not, Audit assessed taxpayer, as seller, for the use tax that it should have collected and remitted on all of its sales shipped to Indiana locations since 1986.

Taxpayer believes that Audit's assessment overstates taxpayer's use tax liability. Taxpayer offers two rationales in support of its position. First, taxpayer believes that some of the assessed sales to its Indiana purchasers would have qualified as exempt transactions. Second, taxpayer believes that many of its purchasers have already self-assessed and remitted use tax directly to the state of Indiana. Under either scenario, taxpayer argues that it would be "inequitable" for the Department to require taxpayer to pay an additional levy. To remedy any "double taxation" effects, taxpayer recommends that the amount of use tax assessed should be offset to the extent that its Indiana purchasers have previously paid the use tax, or that the transactions were found to be exempt.

Taxpayer admits that had it been aware of its Indiana responsibilities, it would have collected exemption certificates, or other relevant documentation, to show that some of its sales to Indiana purchasers were exempt transactions. See IC 6-2.5-8-8(a). Taxpayer also states that it would have collected direct pay permits from those Indiana purchasers who had intended to self-assess and remit use tax directly to the state of Indiana. See IC 6-2.5-8-9(b). However, because taxpayer was unaware of its duty to collect and remit use tax, taxpayer did not collect such documentation. Taxpayer explains that its present situation - as evidenced by taxpayer's merger with another company, the relatively minimal contacts which created nexus with the state of Indiana, and the length of the audit period (nine years) – makes it extremely difficult, if not impossible, for taxpayer to provide the proper documentation. Taxpayer now asks for assistance.

As a pragmatic solution, taxpayer suggests that the Department could gather proof from the Department's own records to show that taxpayer's Indiana purchasers had, in fact, self-assessed and remitted use tax. Additionally, taxpayer believes that the Department can produce evidence showing that some of taxpayer's sales qualified as exempt transactions.

The requirements imposed on retailers engaged in sales and shipments to the state of Indiana are clear.

Indiana imposes a use tax "on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC 6-2.5-3-2(a).

Additionally, 45 IAC 2.2-3-20 states:

> All purchases of tangible personal property which are delivered to the purchaser for storage, use, or consumption in the state of Indiana are subject to the use tax. The use tax must be collected by the seller if he is a retail merchant described in ….[45 IAC 2.2-3-19] or if he has Departmental permission to collect the tax.

45 IAC 2.2-3-19(b)(2) describes those retail merchants who must collect Indiana use tax.

> Any retail merchant engaged in selling at retail for use, storage, or consumption in Indiana and having any representative, agent, sale[s]man, canvasser or solicitor operating in Indiana under the authority of the retail merchant or its subsidiary for the purpose of selling, *delivering*, or taking orders for the sale of any tangible personal property for use, storage, or consumption in Indiana. (Emphasis added.). See also IC 6-2.5-3-1(c).

So when taxpayer sold merchandise destined for use in Indiana, taxpayer, as an out-of-state seller, was required to collect Indiana use tax. To avoid its collection and remittance responsibilities, taxpayer should have received either a copy of purchaser's direct payment permit or certificate of exemption. Taxpayer's failure to collect the proper documentation now requires taxpayer, as seller, to collect and remit use tax on all sales of merchandise destined for use in Indiana.

The ultimate question, however, is not one of whether taxpayer owes the tax; rather, it is a question of determining what kind of proof - of payment or exemption - the Department will accept. Again, this issue would be moot if taxpayer had kept the proper documentation - either in the form of direct pay permits or certificates of exemption given by the buyer to the seller at the time of the sales transactions. Taxpayer cannot supply such proof. Taxpayer now urges the Department to review the Department's own records to determine if the Indiana buyers have self-assessed use tax on the purchases at issue or could have provided to the taxpayer valid exemption certificates at the time of the sales.

We note the language of IC 6-8.1-5-1(b), which reads in part:

> The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

As required by our statutory language (see IC 6-2.5-8-8(a) and IC 6-2.5-8-9(b)), retail merchants must supply the documentary evidence - either in the form of direct pay permits or certificates of exemption - to show that a particular sales transaction was exempt from use tax collection. Even absent such language, under IC 6-8.1-5-1(b), taxpayer still bears the burden of showing that Audit's assessment was wrong. In its protest, taxpayer has asked the Department to supply evidence which would show that taxpayer does not owe the assessed tax. The essence of taxpayer's request, however, is to transfer its burden of proof to the Department. Taxpayer cannot escape its statutory responsibilities by insisting that the Department is better able to present evidence in support of taxpayer's own position. Taxpayer's argument subverts the statutory scheme.

However, the Department believes that taxpayer should be allowed some evidentiary alternatives. Specifically, the Department will allow taxpayer to receive credit for the use tax that was self-assessed and paid by its Indiana customers. To that end, taxpayer must produce documentation showing that its Indiana customers have paid use tax on the sales transactions in question.

FINDING

Taxpayer's protest is denied to the extent that taxpayer wishes to place the evidentiary burden on the Department. Taxpayer's protest is sustained, however, to the extent that taxpayer can show that its Indiana customers have paid the use tax.

II. Tax Administration — Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) penalty. The negligence penalty imposed under IC 6-8.1-10-2.1(e) may be waived by the Department where reasonable cause for the deficiency has been shown by the taxpayer. Specifically:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-2.1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. 45 IAC 15-11-2(e).

The Department recognizes that nexus issues defy bright-line analysis. However, in this instance, given the continuous nature of taxpayer's regular contacts with the state of Indiana, taxpayer should have been aware of its tax collection and remittance responsibilities. At a minimum, taxpayer should have contacted the Department and inquired about its collection requirements.

FINDING

The Department finds that application of the negligence penalty is appropriate. Taxpayer’s protest is denied.